

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**STANLEY L. FOSTER**  
Claimant

VS.

**ACME FOUNDRY, INC.**  
Self-Insured Respondent

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Docket No. **227,769**

**ORDER**

Claimant appealed Administrative Law Judge Jon L. Frobish's Award dated January 4, 2001. The Board heard oral argument on June 8, 2001, in Wichita, Kansas.

**APPEARANCES**

Claimant appeared by his attorney, E. L. Kinch. The self-insured respondent appeared by its attorney, Paul Kritz.

**RECORD & STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUE**

The Administrative Law Judge determined the claimant sustained a 49 percent functional impairment to the left upper extremity at the shoulder as a result of his work-related injury.

The issue raised on review by the claimant is the nature and extent of disability. The claimant asserts that he sustained a non-scheduled disability rather than the scheduled disability awarded by the Administrative Law Judge. Accordingly, the claimant contends that he is entitled to an award for a permanent total disability or in the alternative a work disability.

Conversely, the respondent contends the Administrative Law Judge's decision should be affirmed.

**FINDINGS OF FACT & CONCLUSIONS OF LAW**

The claimant sustained a work-related injury on April 7, 1997, when he was in the process of removing some lodged parts from a machine he was operating and a gate of the machine closed on his left hand trapping him for a 20-minute period. The claimant sustained a severe crush injury to his hand and was transferred to the Overland Park Regional Medical Center for reconstructive surgery which was performed by Dr. Bruce Silverberg, an orthopedic surgeon. Dr. Silverberg performed extensive reconstructive surgery on the claimant's left hand on April 8, 1997. Following surgery, the claimant also complained of shoulder pain on several occasions.

Upon his release from the hospital, the claimant saw Dr. Snitovsky for treatment of his shoulder. Dr. Snitovsky diagnosed shoulder tendinitis and provided conservative treatment. Following a preliminary hearing, the Administrative Law Judge ordered treatment with Dr. Lanny Harris and claimant received additional conservative treatment to his shoulder.

On June 17, 1997, Dr. Silverberg performed a second surgery on the claimant's hand for fixation pin extraction of the left ring finger, extraction of two transverse pins left middle finger, closed joint manipulation to complete release for the index and small finger metacarpal phalangeal joints as well as proximal and distal interphalangeal joints of the middle, ring and small fingers.

On September 12, 1997, the claimant was at the respondent's office to get his check and was met by Edward Gietl, the director of human resources. Mr. Gietl informed the claimant that Dr. Silverberg had given claimant a light-duty release. The claimant was advised he was to return to work on September 14, 1997, to perform one-handed light-duty work. The one-handed light-duty work was described as dipping cores.

The claimant did not show up for work on September 14, 1997. After he was absent for three days, claimant was terminated based on respondent's policy regarding unexcused absences.

Dr. Murati examined the claimant on March 25, 1999, and diagnosed the claimant with reflex sympathetic dystrophy (RSD) of the left upper extremity secondary to trauma and left scapular bursitis secondary to trauma. Dr. Murati recommended a course of treatment consisting of stellate ganglion blocks as well as aggressive physical therapy to increase his range of motion. Moreover, the doctor concluded the claimant would benefit from trigger point injections in the left trapezius and scapular regions.

The Administrative Law Judge referred the claimant to Dr. James R. Hay for an independent medical examination for treatment recommendations. Dr. Hay treated the claimant's left shoulder with a series of stellate ganglion blocks.

On February 16, 2000, the claimant was again referred by his attorney to Dr. Murati for permanent impairment rating. Dr. Murati diagnosed the claimant with RSD in the left upper extremity, left scapulothoracic bursitis and loss of range of motion of the left second through fifth digits. The only restrictions the doctor imposed on the claimant was to use common sense regarding the left upper extremity. The doctor then rated the claimant's impairment according to the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition. Dr. Murati determined that for the loss of range of motion of the left second through fifth digits the claimant received a 45 percent hand impairment which converts to a 41 percent left upper extremity impairment. In addition, for the crepitus of the scapulothoracic joint, the doctor assigned an 18 percent left upper extremity impairment. Using the Combined Value Charts, the doctor concluded the claimant had a 52 percent left upper extremity impairment.

Dr. Murati issued a second report, also dated February 2, 2000, and when questioned regarding this second report noted that he received a call from the claimant's counsel asking him to recalculate the impairment based upon a whole person rating. In the second report, Dr. Murati added restrictions against no climbing ladders, no crawling, no repetitive grab with the left arm, no heavy grasping with the left arm, no above chest-level work with the left arm and no work more than 18 inches from the body with the left arm, occasional repetitive hand controls with the left arm and weight restrictions on lift, carry, push, pull of 20 pounds occasional, 10 pounds frequent and 5 pounds constant. Dr. Murati then determined for the loss of range of motion of the left second through fifth digits the claimant received a 45 percent hand impairment which converts to a 41 percent left upper extremity which converts to a 25 percent whole person impairment. For the crepitus of the scapulothoracic joint, the doctor rated the claimant with an 11 percent whole person impairment and using the combined value charts determined the claimant had sustained a 33 percent whole person impairment.

The second report issued by Dr. Murati changed the impairment for the scapulothoracic joint from an upper extremity impairment to a whole person impairment. Dr. Murati explained why he changed the rating in the following colloquy:

Q. Your initial impression, however, was that this was a scheduled injury to the left upper extremity; isn't that true?

A. I was asked to provide an impairment based on an upper extremity problem. When Mr. Kinch saw the report, I guess he believes or thinks there is a case to call this a whole person. So he asked me to change it to a whole person and give restrictions, which I did.<sup>1</sup>

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<sup>1</sup>Deposition of Pedro A. Murati, M.D., October 9, 2000, p.23.

When further questioned regarding the upper extremity impairment, Dr. Murati noted that the scapula and bursa are part of the shoulder and he noted that the bursa is between the shoulder and chest wall and is part of either.

The respondent referred the claimant to Dr. Mills for evaluation and rating. Dr. Mills examined the claimant on May 15, 2000. The doctor noted that the claimant's subjective complaints in his hand are consistent with the objective findings upon examination. The doctor further noted the subjective complaints in the shoulder were not consistent with the objective findings. Dr. Mills diagnosed the claimant as status post crush injury to the hand which necessitated two surgeries, shoulder/hand syndrome as well as depression. Dr. Mills noted the claimant appeared depressed which was noted in his report but he made no determination regarding its causation.

Based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, Dr. Mills concluded the claimant sustained a 40 percent impairment to the hand and a 15 percent impairment to the left upper extremity which combined for a 49 percent permanent partial impairment to the left upper extremity at the shoulder.

Although Dr. Murati indicated the claimant suffered left scapulothoracic bursitis, Dr. Mills specifically noted that he did not make such a finding and opined it is not consistent with the type of injury the claimant sustained. Moreover, Dr. Mills noted that the left scapulothoracic joint is part of the shoulder. It's the shoulder blade where it articulates with the rib cage.

In the determination of whether the claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available. *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984); *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986). If the situs of the disability is to the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, the disability is considered a scheduled disability.<sup>2</sup>

Dr. Murati's initial report limited the claimant's impairment to the left upper extremity. It is significant to note that for the crepitus of the scapulothoracic joint, the doctor rated an 18 percent left upper extremity impairment. It was not until after he consulted with the claimant's attorney that Dr. Murati then designated the same crepitus to the scapulothoracic joint as an 11 percent whole person impairment.

The Board adopts Dr. Mills' findings and impairment rating as more persuasive. He examined the claimant after Dr. Murati's examination and specifically determined that there

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<sup>2</sup>K.S.A. 44-510d(a)(13).

was no scapulothoracic bursitis. Moreover, it should be noted that Dr. Murati's initial 52 percent rating to the left upper extremity and Dr. Mills' 49 percent rating to the left upper extremity were not significantly different.

Based upon a review of the entire evidentiary record, it is the Board's determination that Dr. Mills' rating is more persuasive in this case and the claimant has met his burden of proof to establish that as a result of his work-related injury he sustained a 49 percent impairment to the left upper extremity at the shoulder. Accordingly, Administrative Law Judge Jon L. Frobish's award is affirmed in all respects.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated January 4, 2001, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

pc: E. L. "Lee" Kinch, Attorney, Wichita, Kansas  
Paul Kritz, Attorney, Wichita, Kansas  
Jon L. Frobish, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director